

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CLEMENTE SANTIAGO, MIGUEL)
 ANDRADE BECERRA, and MARIO)
 BAUTISTA SANCHEZ,)

Plaintiffs,)

v.)

TAMARACK TREE COMPANY, and)
 BILL WITHERS,)
 Defendants.)

No. CV-06-1811-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiffs Clemente Santiago, Miguel Andrade Becerra, and Mario Bautista Sanchez, bring this action against defendants Tamarack Tree Company and Bill Withers. Plaintiffs bring claims under the federal Agricultural Workers Protection Act (AWPA), the Fair Labor Standards Act (FLSA), Oregon wage statutes, and the

1 - FINDINGS & RECOMMENDATION

1 Oregon Contractor Registration Act (OCRA).

2 An Order of Default was entered May 16, 2007. Plaintiffs now
3 seek a default judgment. I recommend that the motion be granted in
4 part and denied in part. Plaintiffs also move for an award of
5 attorney's fees. I recommend that the attorney's fee motion be
6 granted.

7 DISCUSSION

8 I. Hearing

9 Federal Rule of Civil Procedure 55 provides that when the
10 plaintiff's claim against a defendant is for a sum certain or for
11 a sum which can by computation be made certain, the clerk, upon
12 request of the plaintiff and upon affidavit of the amount due,
13 shall enter judgment for that amount as well as costs against the
14 defendant. Fed. R. Civ. P. 55(b)(1). In other cases, if, in order
15 to enable the Court to enter judgment or to carry it into effect,
16 it is necessary to determine the amount of damages or to establish
17 the truth of any averment by evidence or to make an investigation
18 of any other matter, the court may conduct a hearing or order such
19 references as it deems necessary and proper. Fed. R. Civ. P.
20 55(b)(2).

21 The Ninth Circuit has followed the First Circuit in holding
22 that a claim is not a sum certain unless there is no doubt as to
23 the amount to which a plaintiff is entitled as a result of the
24 defendant's default. Franchise Holding II, LLC v. Huntington
25 Restaurants Group, Inc., 375 F.3d 922, 928-29 (9th Cir. 2004)
26 (citing KPS & Assocs., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 19
27 (1st Cir. 2003)), cert. denied, 544 U.S. 949 (2005).

28 However, even in cases without a "sum certain," a formal court

1 hearing is not required in every case. The hearing may be on
2 affidavits or declarations and the court may base its judgment on
3 those documents. See Davis v. Fendler, 650 F.2d 1154, 1161-62 (9th
4 Cir. 1981) (affirming default judgment with damages assessed based
5 on documentary evidence); see also Fustok v. ContiCommodity Servs.,
6 Inc., 873 F.2d 38, 40 (2d Cir. 1989) (Rule 55(b)(2) leaves the
7 decision of whether a hearing is necessary to the discretion of the
8 district court and the court may rely on detailed affidavits or
9 documentary evidence to evaluate damages).

10 Plaintiffs seeks damages under all four statutes. Plaintiffs
11 contend that the claims for wages under the FLSA and the Oregon
12 wage statutes, as well as the OCRA claim, provide for recovery of
13 statutory damages that are capable of mathematical calculation.
14 Plaintiffs note that the amount of statutory damages to be awarded
15 under the AWPB is discretionary because it provides up to \$500 per
16 plaintiff per violation. Plaintiffs argue that a hearing is
17 unnecessary because the declarations submitted in support of the
18 default judgment motion provide sufficient support for the full
19 statutory amount. I agree with plaintiffs and issue this Findings
20 & Recommendations based on the Complaint and the documentary
21 evidence submitted in support of the motion for default judgment.

22 II. Factual Allegations in Support of Liability

23 Upon default, the factual allegations of the complaint, except
24 those relating to damages, are taken as true. TeleVideo Sys., Inc.
25 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987). This includes
26 questions of fact such as whether a party acted willfully or
27 intentionally. See Rio Properties, Inc. v. Rio Int'l Interlink,
28 284 F.3d 1007, 1023 (9th Cir. 2002) (affirming district court

1 determination, by entry of default, that party's acts were
2 committed knowingly, maliciously, and oppressively, and with an
3 intent to injure, because upon entry of default, factual
4 allegations of the complaint are deemed true); Adriana Int'l Corp.
5 v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990) (holding
6 allegations of, inter alia, fraud and intentional infliction of
7 emotional distress to be established upon default and on that
8 ground rejecting a challenge that evidence of such was
9 insufficient).

10 The factual allegations in the Complaint, now taken as true,
11 establish that:

12 (1) Defendants recruited plaintiffs in November 2005 to
13 harvest, tie, and load nursery stock trees in various locations in
14 Oregon and employed them in this work on several occasions; Compl.
15 at ¶ 6; see also Santiago Declr. at ¶ 2 (worked with the two other
16 plaintiffs harvesting, tying, and loading nursery tress for
17 defendants at various locations in Oregon); Bautista Sanchez Declr.
18 at ¶ 2 (same);

19 (2) Plaintiffs worked with products which were intended for
20 use in interstate commerce; Compl. at ¶ 7;

21 (3) Defendants did not give plaintiffs written disclosure of
22 the terms or conditions of their employment at the time of
23 recruitment or hire, and did not post the same at any of the work
24 sites; Compl. at ¶ 8; see also Santiago Declr. at ¶ 11 (at time of
25 recruitment, not given any written disclosure of terms and
26 conditions of employment and none of the workers has any written
27 information about the work); Bautista Sanchez Declr. at ¶ 11
28 (same);

1 (4) Plaintiffs were told that they would be paid \$100 per day
2 for each day of work; Compl. at ¶ 9; see also Santiago Declr. at ¶¶
3 3, 4 (defendants promised to pay \$100 for each day of work; workday
4 was 6:30 a.m. to 6:00 p.m. with a half-hour lunch break); Bautista
5 Sanchez Declr. at ¶¶ 3, 4 (same);

6 (5) Defendants willfully failed to pay plaintiffs all of their
7 wages when defendants terminated plaintiffs' employment on March 6,
8 2006; Compl. at ¶ 10; see also Santiago Declr. at ¶¶ 5, 8
9 (defendants did not pay for last day of work in 2006 and have never
10 paid him for his final day of work); Bautista Sanchez Declr. at ¶¶
11 6, 8 (defendants did not pay for last five days of work in March
12 2006 and have never paid for his final week of work);

13 (6) Defendants failed to pay plaintiff Santiago for one day of
14 work performed during the last week of February 2006, and owe him
15 \$100 in unpaid wages; Compl. at ¶ 11; see also Santiago Declr. at
16 ¶¶ 5, 8 (defendants did not pay for last day of work in 2006 and
17 have never paid him for his final day of work); Bautista Sanchez
18 Declr. at ¶¶ 6, 9 (defendants did not pay the other two plaintiffs
19 for all their work in March 2006; defendants did not pay Santiago
20 for all work);

21 (7) Defendants have failed to pay plaintiff Andrade Becerra
22 for six days of work performed during the first week of March 2006,
23 and owe him \$600 in unpaid wages; Compl. at ¶ 12; see also Santiago
24 Declr. at ¶¶ 6, 9 (defendants did not pay the other two plaintiffs
25 for all of their work in March 2006; defendants have not paid
26 Andrade Becerra or Bautista Sanchez for last week of work);
27 Bautista Sanchez Declr. at ¶¶ 6, 9 (defendants did not pay the
28 other two plaintiffs for all their work in March 2006; defendants

1 did not pay Andrade Becerra for all work);

2 (8) Defendants have failed to pay plaintiff Bautista Sanchez
3 for five days of work performed during the first week of March 2006
4 and owe him \$500 in unpaid wages; Compl. at ¶ 13; see also Santiago
5 Declr. at ¶¶ 6, 9 (defendants did not pay the other two plaintiffs
6 for all their work in March 2006; defendants have not paid Bautista
7 Sanchez for last week of work); Bautista Sanchez Declr. at ¶¶ 5, 8
8 (defendants did not pay him for last five days of work in March
9 2006; defendants have never paid him for final week of work);

10 (9) Plaintiffs never received W-2 forms for work they
11 performed for defendants in 2005; Compl. at ¶ 14; see also Santiago
12 Declr. at ¶ 15 (did not sign any written forms for employment and
13 did not receive any W-2 forms); Bautista Sanchez Declr. at ¶ 15
14 (same);

15 (10) Plaintiffs never received itemized pay statements from
16 defendants for their work; Compl. at ¶ 15; see also Santiago Declr.
17 at ¶ 14 (was paid in cash and never given an itemized pay statement
18 for his work); Bautista Sanchez Declr. at ¶ 14 (same);

19 (11) Plaintiffs have repeatedly requested their unpaid wages
20 from defendants; Compl. at ¶ 16; see also Santiago Declr. at ¶ 7
21 (declarant and other plaintiffs asked defendants for their wages
22 several times); Bautista Sanchez Declr. at ¶ 7 (same);

23 (12) Plaintiffs made written demand for their wages on April
24 21, 2006, and June 23, 2006; Compl. at ¶ 17;

25 (13) Plaintiffs attempted in good faith to resolve the issues
26 in dispute without litigation; Compl. at ¶ 18;

27 (14) Defendants are not registered as farm labor contractors
28 as required under the AWPA or the ORCA; Compl. at ¶ 19; see also

1 Santiago Declr. at ¶ 10 (at time of recruitment and work, never saw
2 any farm labor contractor licenses issued to defendants); Bautista
3 Sanchez Declr. at ¶ 10 (same);

4 (15) Plaintiffs have been required to obtain the services of
5 an attorney to enforce their rights and are entitled to reasonable
6 attorney's fees under the FLSA and Oregon statutes; Compl. at ¶ 21;

7 (16) Plaintiffs will continue to work in agriculture and
8 suffer harm unless defendants are enjoined from future law
9 violations; Compl. at ¶ 22.

10 III. AWPB Claim - Damages

11 In addition to the facts above, plaintiffs allege the
12 following facts detailing their AWPB claim: (1) defendants
13 intentionally violated the AWPB by not registering as farm
14 contractors; 29 U.S.C. § 1811; (2) defendants intentionally
15 violated the AWPB by failing to provide a written work disclosure;
16 29 U.S.C. § 1821(a); (3) defendants intentionally violated the AWPB
17 by failing to post the information required by the AWPB; 29 U.S.C.
18 § 1821(b); (4) defendants intentionally violated the AWPB by
19 failing to make, keep, and preserve worker records; (5) defendants
20 intentionally violated the AWPB by failing to provide plaintiffs
21 with an itemized wage statement; 29 U.S.C. § 1821(d)(2); and (6)
22 defendants intentionally violated the AWPB by failing to pay wages
23 when due; 29 U.S.C. § 1822(a). Compl. at ¶¶ 23-29.

24 By virtue of the factual allegations now deemed admitted,
25 liability for each of these violations as to each plaintiff, is
26 established. The AWPB provides for a private right of action and
27 damages:

28 If the court finds that the respondent has intentionally

1 violated any provision of this chapter or any regulation
 2 under this chapter, it may award damages up to and
 3 including an amount equal to the amount of actual
 4 damages, or statutory damages of up to \$500 per plaintiff
 5 per violation, or other equitable relief, except that (A)
 multiple infractions of a single provision of this
 chapter or of regulations under this chapter shall
 constitute only one violation for purposes of determining
 the amount of statutory damages due a plaintiff;

6 29 U.S.C. § 1854(c) (1). Additionally, "[i]n determining the amount
 7 of damages to be awarded under paragraph (1), the court is
 8 authorized to consider whether an attempt was made to resolve the
 9 issues in dispute before the resort to litigation." 29 U.S.C. §
 10 1854(c) (2) .

11 In the context of the AWP, an "intentional" violation means
 12 a conscious or deliberate one, and there is no requirement of a
 13 specific intent to violate the law. Alvarez v. Longboy, 697 F.2d
 14 1333, 1338 (9th Cir. 1983) (noting the meaning given "intentional"
 15 in other remedial statutes); Herrera v. Singh, 103 F. Supp. 2d
 16 1244, 1248 (E.D. Wash. 2000) (intentional acts under § 1854 must be
 17 only conscious or deliberate and do not require a specific intent
 18 to violate the law). A plaintiff need not show actual injury to
 19 recover statutory damages under the AWP. Martinez v. Shinn, 992
 20 F.2d 997, 999 (9th Cir. 1993).

21 The Martinez court reiterated that "[t]he civil remedy was
 22 provided not only to compensate injuries, but also to promote
 23 enforcement of the Act and deter violations." Id. at 999 (internal
 24 quotation omitted); see also Torres-Lopez v. May, 111 F.3d 633, 639
 25 (9th Cir. 1997) (noting that Congress passed the predecessor
 26 statute to the AWP to "alleviate widespread suffering of
 27 farmworkers by regulating farm labor contractors"); Beliz v. W.H.
 28 McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985)

1 (purpose of civil remedy is not restricted to compensation of
2 individual plaintiffs but is designed also to promote enforcement
3 of the Act and thereby deter and correct the exploitative practices
4 that have historically plagued the migrant farm labor market).

5 The Beliz court also noted that in awarding statutory damages,
6 "it ought not to be cheaper to violate the Act and be sued than to
7 comply with the statutory requirements." Beliz, 765 F.2d at 1332.
8 Furthermore, as the Beliz court explained, "the legislative history
9 of the Act notes that farm workers who attempt to assert their
10 rights must overcome a general background of fear and intimidation
11 caused by the widespread practice of retaliation against those who
12 complain about violations." Id. Thus, "[a]wards should be
13 adequate to encourage workers to assert their statutory rights."
14 Id. at 1332-33; see also Herrera, 103 F. Supp. 2d at 1248
15 ("[o]verall, an award of damages should be designed to effectuate
16 the dual purposes of the AWPA: (1) to promote enforcement of the
17 Act and deter violations; and (2) to compensate injuries of farm
18 workers.").

19 The Ninth Circuit has established seven factors to consider in
20 determining an award of statutory damages: (1) the amount of award
21 to each plaintiff; (2) the total award; (3) the nature and
22 persistence of the violations; (4) the extent of the defendant's
23 culpability; (5) damage awards in similar cases; (6) the
24 substantive or technical nature of the violations; and (7) the
25 circumstances of each case. Martinez, 992 F.2d at 997.
26 Additionally, as noted above, the statute itself requires
27 consideration of any attempts made to resolve the dispute before
28 resorting to litigation.

1 As to this latter statutory requirement, the factual record in
2 the case shows that plaintiffs attempted to resolve the issues in
3 this dispute before resorting to litigation, without success.
4 First, plaintiffs repeatedly requested their wages from defendants.
5 Compl. at ¶ 16. Then, they made two separate written demands to
6 defendants, through counsel. Id. at ¶ 17.

7 Finally, the Ninth Circuit also notes that an aggregate award
8 should not be "disproportionately punitive." Martinez, 992 F.2d at
9 999.

10 A. Amount of Award to Each Plaintiff

11 On the AWP claim, each plaintiff seeks \$500 per violation,
12 for a total of \$3,000.

13 B. Total Award

14 On the AWP claim, the total award sought by the three
15 plaintiffs against defendants is \$9,000.

16 C. Nature and Persistence of Violations

17 I agree with plaintiffs that the facts establish that
18 defendants' violations were multiple and flagrant. First, there
19 were six separate violations of the Act. Second, two of the
20 violations, licensing as a labor contractor and timely payment of
21 all wages, go to the heart of the Act's protections. Third, unlike
22 cases in which the required disclosures, postings, wage records, or
23 wage statements were inadequate or sloppy, here, they were
24 completely nonexistent. Defendants utterly failed to even attempt
25 compliance with the law. Moreover, they have now refused to
26 respond to plaintiffs' claims.

27 D. Extent of Defendants' Culpability

28 Plaintiffs argue that because defendants still refused to

1 comply with the law after receiving notice of these claims, these
2 violations did not result from ignorance and misconceptions as to
3 the law, but from an abusive disregard for plaintiffs' rights.
4 Plaintiffs' argument is not an unreasonable conclusion to draw from
5 defendants' failure to comply with the law after notice of
6 defendants' actions.

7 E. Damage Awards in Similar Cases

8 Plaintiffs state that on numerous occasions, full statutory
9 damages have been awarded in cases with similar facts. Where
10 employers failed to provide written disclosures and knowingly
11 provided false or misleading information, courts have held that the
12 full statutory penalty should be invoked. E.g., Herrera, 103 F.
13 Supp. 2d at 1250 (\$500 per violation appropriate when employer
14 provided information only orally and the information so provided
15 was misleading); Castillo v. Case Farms of Ohio, Inc., 96 F. Supp.
16 2d 578, 631, 633-34 (W.D. Tex. 1999) (describing the provision of
17 written disclosures as a "basic" AWPA requirement and assessing
18 \$500 statutory maximum for failure to comply); Smith v. Bonds, No.
19 91-818-CIV-5-D, 1993 WL 556781, at *13 (E.D.N.C. Sept. 28, 1993)
20 (awarding maximum statutory penalty of \$500 for each violation of
21 failure to provide written disclosures and knowingly providing
22 false and misleading information because these recruitment
23 provisions are significant, substantive violations, not merely
24 technical violations because one of the primary purposes of the Act
25 was to provide agricultural workers with information concerning
26 potential employment so they could make an intelligent and informed
27 judgment about whether to accept employment).

28 Plaintiffs also cite to cases where full statutory penalties

1 have been awarded where the defendant has failed to keep wage
2 records, provide wage statements, or pay wages when due. E.g.,
3 Herrera, 103 F. Supp. 2d at 1251-52 (\$500 maximum awarded for
4 defendant's violation of requirement to make and preserve for three
5 years an accurate record of an employee's work and payment
6 information); Leach v. Johnston, 812 F. Supp. 1198, 1212 (M.D. Fla.
7 1992) (awarding statutory maximum for violation of requirement to
8 make wage records and provide wage statements).

9 F. Substantive or Technical Nature of the Violations

10 The Ninth Circuit has held that recruiting workers without
11 disclosing the terms and conditions of employment, failing to keep
12 and provide the workers with records of the amount of hours worked
13 by each worker and the amount deducted from the workers' paychecks,
14 failing to pay the workers' wages when due, and paying them only
15 when the workers hired an attorney, are all substantive and not
16 technical violations. Martinez, 992 F.2d at 1000.

17 The Castillo court, quoting the Smith decision from North
18 Carolina, stated that

19 "[v]iolations of the disclosure and misleading
20 information provisions are significant, substantive
21 violations, not merely technical violations because one
22 of the primary purposes of the AWPAA was to provide
23 agricultural workers with information concerning
24 potential employment so they could make an intelligent
25 and informed judgment about whether to accept
26 employment."

27 Castillo, 96 F. Supp. 2d at 632 (quoting Smith, 1993 WL 556781, at
28 *13) (brackets omitted).

Also, failure to keep and provide the workers with records of
the amount of hours worked by each worker and the amounts deducted
from the workers' paychecks, were substantive violations because

1 such a violation "mak[es] it virtually impossible to determine
2 whether the workers were paid the federal minimum wage." Martinez,
3 992 F.2d at 1000.

4 G. Circumstances of Case

5 Plaintiffs argue that full statutory damages are warranted by
6 the circumstances in this case. They state that they are low-
7 income workers who were cheated out of promised work and wages.
8 Defendants did not comply with tax laws for the reporting of income
9 and did not provide required tax information (W-2s) to plaintiffs
10 to enable them to meet their obligations. After receiving notice
11 of these claims, defendants still refused to comply.

12 In his declaration, Santiago states that defendants swore at
13 plaintiffs when they worked and when they asked for their pay.
14 Santiago Declr. at ¶ 17. He "felt really bad that [he] was cheated
15 and not paid for all of [his] work." Id. at ¶ 16. After he lost
16 his job, he was unable to buy food until he found other work. Id.
17 at ¶ 19.

18 Bautista Sanchez states that during their work, defendants
19 treated the plaintiffs badly and swore at them if they asked any
20 questions about the work or pay. Bautista Sanchez Declr. at ¶ 16.
21 He also felt "really bad" that he was cheated and not paid for all
22 of his work. Id. at ¶ 16. He was unable to pay his bills until he
23 found other work. Id. at ¶ 17. He had to get a loan from a friend
24 to pay rent, the telephone bill, and for groceries. Id. at ¶ 18.

25 Plaintiffs argue that in light of the harmful effects that
26 defendants' violations and abuses have had on the plaintiffs,
27 defendants should be held responsible for the maximum permissible
28 damages. I agree with plaintiffs. Reviewing all seven factors,

1 defendants' failure to comply with the Act, in multiple ways, with
2 intent, requires an assessment of the maximum penalty for each
3 violation for each plaintiff. Thus, I recommend that judgment be
4 entered in each plaintiff's favor for \$3,000 for the AWP claim,
5 for a total of \$9,000 on this claim.

6 IV. FLSA Claim - Damages

7 In the Complaint, plaintiffs allege that defendants failed to
8 pay plaintiffs the federal minimum wage of \$5.15 per hour in at
9 least one work week in violation of 29 U.S.C. § 206(a). Compl. at
10 ¶ 30. Given defendants' default, this allegation is now accepted
11 as true. Plaintiffs seek their unpaid federal minimum wages, plus
12 an equal amount in liquidated damages pursuant to 29 U.S.C. § 216.
13 Id. at ¶ 31. They also seek costs and attorney's fees under 29
14 U.S.C. § 216(b). Prayer at ¶ 8.

15 29 U.S.C. § 206(a)(1) requires employers to pay a minimum of
16 \$5.15 per hour worked to their employees. Under section 216(b),
17 "[a]ny employer who violates the provisions of section 206 . . .
18 shall be liable to the employee or employees affected in the amount
19 of their unpaid minimum wages, . . . and in an additional equal
20 amount as liquidated damages."

21 The factual record shows that Santiago is owed \$56.65 in
22 unpaid federal minimum wages for 11 hours of unpaid work. Compl.
23 at ¶ 11 (defendants failed to pay Santiago for one day of work
24 performed during the last week of February 2006); Santiago Declr.
25 at ¶¶ 4, 5 (work day was from 6:30 a.m. to 6:00 p.m., with a half-
26 hour break for lunch; defendants did not pay him for last day of
27 work in 2006).

28 The factual record shows that Andrade Becerra is owed \$339.90

1 for unpaid federal minimum wages for 66 hours of unpaid work.
2 Compl. at ¶ 12 (defendants failed to pay Andrade Becerra for six
3 days of work performed during the first week of March 2006);
4 Bautista Sanchez Declr. at ¶¶ (work day was from 6:30 a.m. to 6:00
5 p.m., with a half-hour break for lunch; defendants did not pay
6 Andrade Becerra for all of his work in March 2006).

7 The factual record shows that Bautista Sanchez is owed \$283.25
8 for unpaid federal minimum wages for 55 hours of unpaid work.
9 Compl. at ¶ 13 (defendants failed to pay Bautista Sanchez for five
10 days of work performed during the first week of March 2006);
11 Bautista Sanchez Declr. at ¶¶ 4, 5 (work day was from 6:30 a.m. to
12 6:00 p.m., with a half-hour break for lunch; defendants did not pay
13 him for last five days of work in March 2006).

14 Although plaintiffs initially sought both the underlying
15 unpaid minimum wages, plus an equal amount in liquidated damages in
16 this FLSA claim, in the motion for default judgment they have
17 limited the relief they seek to just the liquidated damages and
18 attorney's fees and costs. Thus, they waive the underlying minimum
19 wage claim.

20 This makes sense. AWPAs cases suggest that in considering an
21 award for an AWPAs claim, the court should consider, in addition to
22 the other relevant factors, "plaintiffs' recovery on closely
23 related claims joined in the same suit that will in part compensate
24 the damages caused by violations of the Act." Beliz, 765 F.2d at
25 1333. There, the court noted that although the FLSA had a
26 different purpose, an award of unpaid wages under the FLSA would
27 compensate workers for at least some damage caused by a violation
28 of the AWPAs. Id.

1 Here, plaintiffs seek a statutory damage award under the AWPA
2 of \$500 per plaintiff for each of six different violations, one of
3 which is the failure to pay wages when due. By abandoning the
4 underlying minimum wage claims, plaintiffs avoid seeking an
5 unjustly high award as a result of liability on closely related
6 claims.

7 The evidence supports a judgment in plaintiffs' favor on the
8 liquidated damages portion of their FLSA claims. Thus, I recommend
9 that Santiago be awarded \$56.65 on this claim, that Andrade Becerra
10 be awarded \$339.50 on this claim, and that Bautista Sanchez be
11 awarded \$283.25 on this claim. As discussed below, plaintiffs are
12 also entitled to attorney's fees and costs for prevailing on this
13 claim. 29 U.S.C. § 216(b).

14 V. Oregon Statutory Claims - Damages

15 A. Wage Claim

16 In the Complaint, plaintiffs brought two Oregon wage claims:
17 (1) a claim for minimum wages of \$7.50 per hour under Oregon
18 Revised Statute § (O.R.S.) 653.025; and (2) a claim for failure to
19 pay plaintiffs wages due upon termination under O.R.S. 652.145.
20 Compl. at ¶¶ 32-35. They also sought statutory penalties under
21 O.R.S. 652.150, for each of those claims. Compl. at ¶¶ 33, 35. In
22 the prayer, plaintiffs ask for attorney's fees and costs under
23 O.R.S. 652.200 and O.R.S. 652.055(4).

24 In the motion for default judgment, plaintiffs have abandoned
25 the claim for minimum wages under Oregon law and seek only the
26 statutory penalty under O.R.S. 652.150 for the failure to pay wages
27 upon termination of employment.

28 Under O.R.S. 652.145, "if an employee has worked for an

1 employer as a seasonal farmworker, whenever the employment
2 terminates, all wages earned and unpaid become due and payable
3 immediately." As alleged in the Complaint, defendants terminated
4 plaintiffs' employment on March 6, 2006. Compl. at ¶ 10. Under
5 O.R.S. 652.145, their final wages were due immediately on the date
6 of termination. Those wages have not been paid, despite repeated
7 demand. Compl. at ¶¶ 11-13; Santiago Declr. at ¶¶ 7, 8; Bautista
8 Sanchez Declr. at ¶¶ 7, 8.

9 Under O.R.S. 652.150, if an employer willfully fails to pay
10 wages when work ends,

11 then as a penalty for such nonpayment the wages or
12 compensation of such employee shall continue from the due
13 date thereof at the same hourly rate for eight hours per
14 day until paid or until action therefor is commenced.
15 However, in no case shall such wages or compensation
16 continue for more than 30 days from the due date.

17 O.R.S. 652.150.

18 As stated in the statute, to obtain the penalty, plaintiffs
19 must prove that defendants acted willfully. The word "willful" as
20 used in this and other similar statutes in Oregon, "does not
21 necessarily imply anything blamable, or any malice, or wrong toward
22 the other party, or perverseness or moral delinquency, but merely
23 that the thing done was done or omitted intentionally. It amounts
24 to no more than this: 'That the person knows what he is doing,
25 intends to do what he is doing, and is a free agent.'" Sabin v.
26 Willamette Western Corp., 276 Or. 1083, 1093, 557 P.2d 1344, 1349
27 (1976) (internal quotation omitted).

28 The work of all three plaintiffs terminated on March 6, 2006,
and they still have not been paid their final wages. Under O.R.S.
652.150, each plaintiff is entitled to the full statutory penalty,

1 at the 2006 Oregon minimum wage of \$7.50 per hour, times eight
2 hours, times 30 days, which equals \$1,800 per plaintiff. I
3 recommend that judgment be entered in each plaintiff's favor for
4 \$1,800, or for a total of \$5,400 on this claim.

5 B. Contractor Act Claim

6 Plaintiffs bring a claim under the OCRA, alleging the
7 following violations under O.R.S. 658.440 which provides duties and
8 rules for farm labor contractors:

9 (1) failure to carry at all times a farm labor contractor's
10 license issued by the Oregon Bureau of Labor and Industries; O.R.S.
11 658.440(1)(a);

12 (2) failure to pay plaintiffs wages when due; O.R.S.
13 658.440(1)(c);

14 (3) failure to comply with the "work agreement"; O.R.S.
15 658.440(1)(d);

16 (4) failure to provide plaintiffs a written disclosure upon
17 recruitment; O.R.S. 658.440(1)(f);

18 (5) failure to execute a written agreement with plaintiffs at
19 the time of hire; O.R.S. 658.440(1)(g); and

20 (6) failure to provide plaintiffs an itemized written wage
21 statement; O.R.S. 658.440(1)(h).

22 In the Complaint, plaintiffs seek injunctive relief and
23 statutory damages of \$1,000 for each of these OCRA violations.
24 Compl. at ¶ 42. They also seek attorney's fees. Prayer at ¶ 8.

25 The factual allegations in the Complaint, now accepted as true
26 as a result of the default, establish that defendants violated the
27 OCRA as plaintiffs allege. The statute provides a private right of
28 action and actual damages or \$1,000, whichever is greater, for

1 certain violations. O.R.S. 658.453(4).¹

2 Plaintiffs, however, cannot prevail on this claim on the
3 current record. The private right of action provision requires the
4 aggrieved worker to first file a complaint with the Commissioner of
5 the Oregon Bureau of Labor and Industries (BOLI), before filing a
6 legal action for violations of the OCRA. It states:

7 After filing a complaint with the commissioner, in
8 addition to any other penalty provided by law, a worker
9 has a right of action against a farm labor contractor who
10 violates subsection (1)(c), (d) or (e) of this section or
11 . . . without exhausting any alternative administrative
12 remedies. . . .

13 O.R.S. 658.453(4). By the plain language of the statute, while the
14 worker does not have to exhaust the administrative process before
15 coming to court, the worker must file a complaint with the BOLI
16 Commissioner as a prerequisite to recovering damages in a judgment.

17 The Oregon Administrative Rule interpreting this statute makes
18 it plain:

19 (1) Any worker who wishes to file a civil action pursuant
20 to ORS 658.453(4) must file a complaint with the
21 commissioner.

22 (2) The complaint shall be in writing, and shall contain
23 the name or names of the persons or entities against whom
24 the complaint is being filed. A copy of the proposed
25 complaint to be filed with the court should, if
26 available, be attached to the complaint filed with the

27 ¹ Notably, the statute provides a private right of action
28 for violations of subsections (1)(c), (1)(d), or (1)(e) of O.R.S.
658.440. I see no statutory provision for plaintiffs privately
enforcing the alleged violations of subsections (1)(a), (1)(g),
or (1)(h) of O.R.S. 658.440. Thus, while there may be violations
of subsections (1)(a), (1)(g), and (1)(h), I do not see how
plaintiffs are entitled to damages for them in a private action.
The statute indicates that such violations are redressed by the
Commissioner of the Bureau of Labor and Industries. O.R.S.
653.458(1)(c) (allowing BOLI Commissioner to assess a \$2,000
civil penalty for violations of O.R.S. 658.440(1)).

1 commissioner. The worker filing the complaint with the
2 commissioner should also state whether the worker intends
to pursue a private civil court action.

3 (3) The complaint shall be considered filed with the
4 commissioner on the date that it is mailed to the
following address: . . .

5 (4) The complaint that is filed with the commissioner
6 should be filed prior to the filing in court of a civil
7 complaint pursuant to ORS 658.453(4). However, if the
8 complaint filed with the commissioner is not filed prior
to the filing of a complaint in court but is done so
before the entry of a final judgment, it shall be
considered to be filed timely for purposes of ORS
658.453(4).

9
10 Or. Admin. R. (OAR) 839-015-0600.

11 Based on subsection (4) of the OAR, Magistrate Judge Stewart
12 denied a motion for summary judgment by the defendant in an action
13 with OCRA claims because, although the plaintiffs had not filed a
14 complaint with the BOLI Commissioner before filing the action in
15 court, they had filed it at some point before the resolution of the
16 summary judgment motion. Gaspar v. Ochoa, No. CV-02-257-ST, 2002
17 WL 31972184, at *2 (D. Or. Oct. 10, 2002). She noted that the
18 filing requirement was not jurisdictional and given that the
19 plaintiffs had filed the BOLI complaint, the defendants' argument
provided no basis for summary judgment against the OCRA claims.

20 In the instant case, however, I find no allegation in the
21 Complaint that plaintiffs filed a complaint with the BOLI
22 Commissioner. I have read the demand letters plaintiffs' counsel
23 sent to defendants. I have read plaintiffs' counsel's declaration
24 in support of the motion for default judgment and I have read the
25 declarations of the two plaintiffs submitted in support of the
26 motion. There is no evidence that the complaint with the BOLI
27

1 Commissioner has ever been filed.² Thus, plaintiffs cannot prevail
2 on this claim.

3 If, upon review of this Findings & Recommendation, the
4 District Judge concludes that damages for the OCRA violations
5 should be awarded, I recommend that plaintiffs be awarded the
6 maximum award of \$1,000 per violation, or \$3,000 per plaintiff, for
7 a total of \$9,000 (as explained above, plaintiffs have a private
8 right of action for violations of only certain subsections of
9 O.R.S. 658.440. There are three alleged violations of those
10 subsections for each plaintiff, for a total of \$3,000 per
11 plaintiff).

12 However, because the conduct forming the basis of the ORCA
13 violations overlaps with the conduct forming the basis of the AWP
14 violations, I recommend adjusting the AWP award downward to
15 account for the duplicative nature of the award. I would adjust
16 the AWP award because the plain language of the ORCA appears to
17 indicate that the \$1,000 per violation is mandatory, unless actual
18 damages are found to be greater, while the AWP award is
19 discretionary and the case law makes clear that an adjustment of an
20 AWP award in consideration of overlapping claims is appropriate.

21 / / /

22
23 ² There is one ambiguous reference in plaintiffs' counsel's
24 declaration filed in support of the Motion for Attorney's Fees,
25 not the Motion for Default Judgment, which suggests there might
26 have been a complaint made. On June 23, 2006, plaintiffs'
27 counsel spent .75 of an hour on "[r]eview client contact
28 information; letters to clients, BOLI." Wilk Declr. in Support
of Mtn for Fees at p. 3. Without more, however, and without
something included in the Complaint or the motion for default
judgment or in a declaration in support of the motion for default
judgment, it is not sufficient.

1 VI. "Unpaid Wages" Damages

2 According to the factual allegations, now established as true,
3 the three plaintiffs were not paid for certain days of work:
4 Santiago for one day of work for \$100, Andrade Becerra for six days
5 of work for \$600, and Bautista Sanchez for five days of work for
6 \$500.

7 In the Complaint, the failure of defendants to pay plaintiffs
8 when due supported an AWPB violation and an OCRA violation. Compl.
9 at ¶¶ 28, 37. The failure to pay them at all for these particular
10 days supported both the federal and state minimum wage claims.
11 Compl. at ¶¶ 30, 32. The failure to pay these owing wages at the
12 time of termination supported the O.R.S. 652.145 claim, allowing
13 for the statutory penalty under O.R.S. 652.150.

14 But, in the Complaint, plaintiffs never seek the money they
15 were actually promised for each day's work - \$100 per day. They
16 make no such claim either in the body of the Complaint or in the
17 prayer. In the motion for default judgment, however, they seek
18 these unpaid wages.

19 The failure to articulate these "unpaid wage" damages in the
20 prayer prevents an award of damages for them in a default judgment.
21 "A judgment by default shall not be different in kind from or
22 exceed in amount that prayed for in the demand for judgment" in the
23 complaint. Fed. R. Civ. P. 54(c); see also Fed. R. Civ. P. 55(d)
24 (making the limitations of Rule 54(c) applicable to judgments by
25 default).

26 Some courts have allowed default judgments for more than the
27 amount prayed for in the complaint when the defendant was present
28 at the damages hearing or when the plaintiff has served notice of

1 the proposed amendment on defendant. Fong v. United States, 300
2 F.2d 400, 412 (9th Cir. 1962) (court may allow amendment to prayer
3 for relief when defendant appears at default hearing); Stafford v.
4 Jankowski, 338 F. Supp. 2d 1225, 1228-29 (D. Kan. 2004) (default
5 judgment exceeding amount of prayer upheld where plaintiff served
6 defaulted defendant with copy of motion for default judgment, which
7 specified amount sought).

8 Here, however, there has been no amendment sought, and
9 plaintiffs have requested that their motion for default judgment be
10 granted without a hearing. Moreover, even if I were to consider
11 allowing an amendment at the hearing or the service of the motion
12 for default judgment which specifies these amounts, I do not see a
13 claim supporting these damages. The AWPA and the OCRA allow for
14 the statutory damages for failure to pay wages when due. As I read
15 the statutes, this is not a basis for asking for the actual wages
16 themselves. Even if plaintiffs sought actual damages under these
17 claims rather than the statutory penalty, a claim for actual
18 damages for these violations would be for the harm caused by the
19 failure to pay the wages when due. There is no record to support
20 an assessment of such damages, nor a request to award them. The
21 request is for the statutory damages.

22 The failure to pay the wages owing upon termination under
23 Oregon law is similar in that it is not a claim for the actual
24 wages, but is a penalty for failure to comply with the statute
25 requiring payment at termination. The minimum wage provisions
26 allow the worker to recover the federal or state guaranteed minimum
27 wage.

28 What is lacking is a claim upon which the promised wage of

1 \$100 per day, may be awarded. Thus, even if it were contained in
2 the Complaint, or allowed to be asserted in another fashion, there
3 is no basis for such an award. I recommend that this portion of
4 the motion for default judgment, be denied.

5 VI. Injunctive Relief

6 In the Complaint, plaintiffs seek to enjoin defendants from
7 committing future violations of the AWPA under 29 U.S.C. §
8 1854(c)(1). Prayer at ¶ 2. They also seek to enjoin defendants
9 from committing future violations of the ORCA under O.R.S. 658.475.
10 Id. at ¶ 7. I recommend that plaintiffs' request for injunctive
11 relief under the AWPA, be granted.

12 VII. Attorney's Fees & Costs

13 By prevailing on both the FLSA and Oregon wage statute claims,
14 plaintiffs are entitled to an award of attorney's fees and costs.
15 29 U.S.C. § 216(b); O.R.S. 652.200; O.R.S. 653.055(4).

16 Plaintiffs seek the \$350 filing fee as costs. I recommend
17 that this be awarded.

18 As for attorney's fees, plaintiffs' counsel spent a total of
19 twenty-six hours on the case and seeks \$5,850, or \$225 per hour.
20 Wilk Declr. in Support of Mtn for Atty Fees at ¶ 11. While that is
21 slightly more than the average hourly rate for attorneys with
22 twenty-one to thirty years of experience in the Upper Willamette
23 Valley in the 2002 Oregon State Bar Economic Survey, even adjusting
24 for inflation at the rate of 3% per year, it is not an unreasonable
25 request and I recommend that the full request be awarded.

26 CONCLUSION

27 I recommend that plaintiffs' motion for default judgment (#10)
28 be granted in part and denied in part, and that plaintiffs' motion

1 for attorney's fees and costs (#15), be granted.

2 SCHEDULING ORDER

3 The above Findings and Recommendation will be referred to a
4 United States District Judge for review. Objections, if any, are
5 due July 30, 2007. If no objections are filed, review of the
6 Findings and Recommendation will go under advisement on that date.

7 If objections are filed, a response to the objections is due
8 August 13, 2007, and the review of the Findings and Recommendation
9 will go under advisement on that date.

10 DATED this 13th day of July, 2007.

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12
13
14 /s/ Dennis James Hubel
15 Dennis James Hubel
16 United States Magistrate Judge
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